Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JULIETTE IRVING,
as Guardian of the Person and Property of
Bryana Bashir, and as Administratrix of
the Estate of Bonita L. Irving, Deceased,
Petitioner,

V.

MAZDA MOTOR CORPORATION;
MAZDA (NORTH AMERICA), INC.;
MAZDA MOTOR OF AMERICA, INC.; and
AUTOALLIANCE INTERNATIONAL, INC.,
Respondents.

Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT M.N. PALMER
(Counsel of Record)
The Law Offices of
Robert M.N. Palmer, P.C.
205 Park Central East
Suite 511
Springfield, MO 65801

GREGORY M. STOKES
Gregory M. Stokes & Associates
100 Colony Square
Suite 820
Atlanta, GA 30361

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QUESTIONS PRESENTED

1. Was the Eleventh Circuit correct when it held that the common law of the fifty states -- a field that has traditionally been occupied by the historic police powers of the sovereign states -- was superseded and pre-empted by Congress in passing the National Traffic and Motor Vehicle Safety Act of 1966 by ruling that an auto maker's compliance with minimum federal safety standards pre-empts common law claims when the Safety Act provides that compliance with those standards does not exempt manufacturers from common law liability and the legislative history of the Act makes clear that Congress did not intend to pre-empt claims such as Petitioner's?

2. Even if the Eleventh Circuit was correct in pre-empting a common law claim alleging a defective and unreasonable design of an automobile restraint system that was permitted under regulations promulgated under the National Traffic and Motor Vehicle Safety Act, was it correct in pre-empting Petitioner's claims based on inadequate warnings where there was no requirement in the regulations regarding the language of required warnings?

3. Did the Eleventh Circuit err when it concluded the National Traffic and Motor Vehicle Safety Act does not contain the clear and manifest intent of Congress to expressly pre-empt state common law claims under the precedents of this Court, but it went on to find those claims were impliedly pre-empted even though such a conclusion still requires a finding that Congress intended to pre-empt those claims and is required to express that intent sufficiently clear to overcome presumptions against pre-emption?

PARTIES TO PROCEEDINGS

To the best of Petitioner's knowledge, the caption contains all of the parties to this action.

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1. *Irving v. Mazda Motor Corporation*, 136 F.3d 764 (11th Cir.1998). Appeal No. 97-8021. Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts).

2. *Irving v. Mazda Motor Corporation*, Civil Action No. 1:94-CV-2964-HTW (U.S.D.C. for the N.D. Ga. November 22, 1996). Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy).

3. *Irving v. Mazda Motor Corporation*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 97-8021. Entered May 4, 1998.

JURISDICTION

This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The district court granted summary judgment against Petitioner on November 22, 1996. The Eleventh Circuit upheld the district court on March 5, 1998. The Eleventh Circuit denied rehearing on May 4, 1998, and this Petition was timely filed pursuant to Supreme Court Rule 13 within 90 days thereof.

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified when the vehicle at issue in this case was manufactured, provided in pertinent part:

15 U.S.C. § 1392(d). Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or state governments. Whenever a Federal motor vehicle safety standard established under this subchapter is in effect no State or political subdivision of a State shall have any authority either to establish, or to continue in effect with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(k). Continuation of common law liability. Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws.

(b) Pre-emption. (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political

subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter. (2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

(e) Common Law Liability. Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law

All of the applicable pre-emption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. This petition, therefore, uses the citations employed in those decisions.

STATEMENT OF THE CASE

On November 19, 1993, Bonita Irving, a young, single mother, was killed when the 1990 Mazda MX-6 she was driving left the roadway of Georgia Highway 54 and rolled over. Even though the occupant space of the vehicle was not significantly compromised, she died as a result of being ejected from the vehicle during the rollover. Petitioner contended below that Ms. Irving would have remained in the vehicle and survived had the passive or automatic seat belt system in the MX-6 included an automatic lap belt or if she had fastened the manual lap belt

provided in the car.

The front seating positions of the 1990 Mazda MX-6 were equipped with a passive restraint system. That system included an automatic shoulder belt that traveled along the interior roof rail above the doors; it closed around the occupant when the doors were shut and moved forward when the doors were opened to allow occupants to enter and exit the seats. Additional components of the passive restraint system included a ramped or inclined seat pan and energy absorbing "knee bolsters" in the lower dashboard or instrument panel. The ramped seat bottom and the knee bolsters were designed to provide passive or automatic restraint of occupants' lower bodies in frontal collisions. This function of restraining an occupant's lower body in a frontal collision is performed in other restraint systems by the lap belt. While not a part of the passive or automatic restraint system, a manual lap belt was provided but was not worn by Ms. Irving at the time of this incident.

Petitioner is the mother of Ms. Irving and the administratrix of her estate. Petitioner commenced the underlying action under the common law of the state of Georgia on theories of negligence, strict product liability for design defect and for failure to provide adequate warnings, and breach of warranty. Generally speaking, Petitioner contends that the occupant restraint system of the MX-6 is only half-passive because a lap belt is an essential part of the restraint system and the only means of effective restraint in a rollover collision. Petitioner contends the system is unreasonably dangerous as designed, and, at a minimum, Mazda owed a duty to warn occupants of the unique risks associated with this half-passive system.

Mazda filed a motion for summary judgment in the

district court arguing that the law of the state of Georgia was pre-empted by federal statutes and regulations pertaining to motor vehicle safety. The National Traffic and Motor Vehicle Safety Act ("Safety Act") was enacted in 1966. That statute created the National Highway Traffic Safety Administration whose obligations included formulating and promulgating federal standards with which all vehicles sold in the United States must comply. One such standard is Federal Motor Vehicle Safety Standard ("FMVSS") 208 which relates to occupant restraint systems. Petitioner does not contend the 1990 MX-6 violated FMVSS 208, and for the purposes of the pre-emption motions, arguments and appeals has conceded that it complies with that regulation.

Mazda contended below that Petitioner's claims and the common law of the state of Georgia are pre-empted by the Safety Act because the MX-6 complied with FMVSS 208 and because a finding that the restraint system included in this case is defective or that Mazda was negligent in designing it would result in a standard under state law that is inconsistent with the standard under federal law. Two original provisions of the Safety Act are relevant here. One section, 15 U.S.C. § 1392(d), provides that, where a safety standard is in effect, states may only prescribe regulations or standards that are identical. Mazda contended below, and the lower courts agreed, that this portion of the statute pre-empts state common law claims that would challenge designs which comply with FMVSS 208. Another portion of the Safety Act, 15 U.S.C. § 1397(k), provides that "[c]ompliance with any motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Petitioner contends that this provision provides the clearest intent of Congress as to the pre-emptive effect of the Safety Act, and Petitioner's claims

and the law of the fifty states are not pre-empted solely because an automobile complies with minimum federal standards with which all cars must comply before they may be lawfully sold.

The district court sustained the Mazda defendants' motion for summary judgment and found Petitioner's claims pre-empted. Petitioner appealed to the Eleventh Circuit of the U.S. Court of Appeals under 29 U.S.C. § 1291. The Eleventh Circuit entered judgment against Petitioner as well, and this Petition for a Writ of Certiorari to that court is made pursuant to 28 U.S.C. § 1294(1).

REASONS FOR GRANTING THE WRIT

There are three reasons why this case is a proper exercise of this Court's discretionary supervisory power. First, the Eleventh Circuit's opinion in this case conflicts directly with opinions from the highest courts in six states that have addressed the important federal question of whether the historic police powers of the states is pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966. Those states, as discussed below, have held their laws are not pre-empted. Litigants with identical claims are handed opposite results depending on the forum in which their claims are brought. If the claim is brought in the courts of six of the eight states whose highest courts have addressed this issue, the claims of those litigants are decided by juries. If the same claim is brought in the three circuits that have addressed this issue since recent pre-emption decisions by this court, that claim is pre-empted and summary judgment is entered against the litigant.

Second, the Eleventh Circuit's opinion and pre-emption analysis in this case conflicts with recent precedent

of this Court. In *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996), this Court ruled that a similar statutory scheme did not evidence Congress's intent to pre-empt state common law. That case involved a statute with language similar to the Safety Act at issue in this case, but the statute in *Medtronic* did not have a savings clause such as the one present in the Safety Act that provides, "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." This additional indicium of Congress's intent and the presumptions against pre-emption set forth in *Medtronic* were given no consideration in the Eleventh Circuit's analysis or ruling. Additionally, this Court's decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), provide for analysis to be undertaken in evaluating the pre-emptive reach of a federal statute which were not a part of the Eleventh Circuit's conclusion in this case.

Third, this case turns on the resolution of an important federal question. In what instances and the extent to which federal statutes supplant and nullify the law of the sovereign states is a matter of extreme importance to the balance of our federal system and the comity of state and federal court systems operating in that system. The traditional powers of the states embodied in the development and application of their tort laws and civil justice systems should not be displaced because that result is arguably consistent with certain selected passages of a large federal act. Congress should clearly express its intent to exercise its powers under the supremacy clause of the Constitution before pre-emptive effect is given to a statute, and this Court has so held. The conflict between federal courts deciding this question and the states' highest courts

reaching opposite results highlights this importance. Most of the states have held their law is not nullified by the Safety Act; federal courts have tended to expand the federal government's role at the expense of those states. The importance of this federal question at this juncture is manifest.

A. There is a Direct Conflict Between the Decisions of Six of the Eight State Courts of Last Resort that Have Decided this Issue and the Three U.S. Circuit Courts of Appeals that Have Decided this Issue Since Recent Relevant Decisions of this Court.

The highest courts of the states of Arizona, Indiana, New Hampshire, New York, Ohio and Texas have ruled that design defect and negligence claims similar to Petitioner's claim in this case are not pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966. *Hernandez-Gomez v. Volkswagen of America, Inc.* 917 P.2d 236 (Ariz. 1996); *Wilson v. Pleasant and General Motors Corp.*, 660 N.E. 2d 327 (Ind. 1995); *Ford Motor Company v. Tebbetts*, 165 A.2d 345, 140 N.H. 203 (N.H. 1995); *Drattel v. Toyota Motor Corp.*, (N.Y. Ct. App., No. 65, June 16, 1998); *Nelson v. Ford Motor Company* 670 N.E. 2d 307 (Ohio Ct. App. 1996); *Hyundai Motor Co. v. Alvarado*, (Sup. Ct. of Texas, No. 95-0969, June 5, 1998). Intermediate appellate courts in California, Missouri, and Oklahoma have agreed. *Ketchum v. Hyundai Motor Company*, 57 Cal. Rptr. 2d 595, 599, 49 Ca. App. 4th 1672 (Cal. App. 2 Dist. 1996); *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149 (Mo. Ct. App. 1994); *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995). Mississippi and Pennsylvania have ruled such claims are pre-empted. *Cellucci v. General Motors Corp.*, 676

A.2d 253 (Pa. Super. 1996); *Cooper v. General Motors Corp.*, 702 So.2d 428 (Miss. 1997).

Ruling with the benefit of this Court's recent decisions of *Cipollone*, *Freightliner*, and *Medtronic*, the U.S. Courts of Appeals for the Ninth, Tenth, and Eleventh Circuits have found such claims are pre-empted by the Safety Act. *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co. Ltd.*, 75 F.3d 1414 (10th Cir. 1996); *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998). The Eleventh Circuit has not consistently taken this position, however, as it allowed such a claim to proceed in *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139 (11th Cir. 1996). The *Doyle* decision was never mentioned in the Eleventh Circuit's underlying opinion in this case, however, leaving one to conclude that whether a litigant's claim will get to a jury in that circuit depends more on the panel he or she draws than on the consistent application of law.

Until this Court addresses the express issue presented by this case -- whether Congress intended the Safety Act to pre-empt claims challenging designs of automobile equipment permitted under minimum federal safety standards -- litigants will continue to be handed opposite results on identical cases depending on the forum in which a particular case is brought. Supreme Court Rule 10(a) provides that considerations of this Court in exercising is discretionary powers of review include the circumstance where a federal court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort. Here, three circuits have recently reached an opposite result of the overwhelming majority of state courts deciding this issue.

The stark nature of this conflict is highlighted by the experiences of lead counsel for Petitioner. A virtually identical claim was tried to a jury by lead counsel last October in St. Louis County, Missouri. *Meyer v. Mazda Motor Corporation*, Cause No. 685669. The jury trial of another nearly identical case is currently set for October 6, 1998 in Fort Bend County, Texas. *Dickerson v. Mazda Motor Corporation*, Cause No. 94,239. Lead counsel and other lawyers have cases pending in state courts across the country which set forth claims nearly identical to Petitioner's. The parties to those cases will have their claims resolved by juries empowered by the common and statutory law of those states.

The experiences of Petitioner, however, and those like her in the Ninth and Tenth Circuits are very different. The claims are the same. The forums are different. And, based solely on the differences in forums, the results are opposite.

These opposite results are not attributable to factual differences from case to case. The question presented in each turns on whether Congress intended to pre-empt the claims in passing the Safety Act. Just as these opposite results present a true conflict rather than a false one, litigants and courts are not served by additional time for this issue to percolate through state and federal appellate courts. The chasm is clear. State courts are reluctant to find their law displaced; federal courts of appeals seem to have an easier time reaching that conclusion. This Court should exercise its supervisory powers to resolve this recurring issue and restore uniformity to the handling of these cases by courts. By doing so, it could restore a sense of justice to this process and prevent others from suffering the fate of Petitioner who is left with the conclusion that

her case would have been decided by a jury if only it could have been filed in a different court.

B. The Eleventh Circuit Decided this Important Federal Question in a Way that Conflicts with Recent Relevant Decisions of This Court.

1. This Court has Recently Reiterated That a Presumption Against Pre-emption Exists and Congress Must Clearly Manifest its Intent to Pre-empt to Overcome That Presumption.

Two terms ago, this Court addressed similar statutory language to regarding the pre-emptive effect of the Medical Device Amendments of 1976 in *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996). Embarking on that analysis, a majority of this Court noted its interpretation of that statute is informed by two presumptions about pre-emption.

> "First, because the States are independent sovereigns in our federal system, we have long presumed Congress does not cavalierly pre-empt state law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. ... That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.
>
> "Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment

> ... that the purpose of Congress is the ultimate touchstone in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose." Id. at 2250 (citations and quotations deleted).

The Eleventh Circuit's decision in this case did not pay heed to this presumption. That court did not find sufficient expression of Congressional intent to hold Petitioner's claims were expressly pre-empted. In fact, it found no such sufficient expression of intent was present. It proceeded from that conclusion, however, to conduct an implied pre-emption analysis which was blind to the presumption. No further mention of it was made, and no consideration to it was given. The court, in fact, left the topic of the statute and decided implied pre-emption existed based on the language of the relevant agency's regulations. *Irving*, 136 F.3d at 768 (finding "Congress specifically intended the standard to give manufactuers a choice ... " when the standard at issue was proposed more than ten years after Congress passed the Safety Act and could not have been an indicium of congressional intent). As quoted above, pre-emption occurs where such is the intent of Congress, not the regulating agency. Had the Eleventh Circuit followed this Court's recent precedent and given effect to the presumption identified above, it would have reached a different conclusion.

2. The Eleventh Circuit's Finding that Petitioner's Claims Were Impliedly Pre-empted Does Not Follow Recent Decisions of this Court.

For twenty years after the Safety Act's 1966

enactment, the nation's appellate courts unanimously agreed that the Safety Act does not pre-empt common law claims. In 1986, however, the U.S. Court of Appeals for the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d at 181, expanding the implied pre-emption doctrine to find certain common law claims involving cigarettes pre-empted despite Congress' intent to the contrary. Within a year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Before this Court had an opportunity to overturn these decisions, the defective strain of implied pre-emption analysis adopted in the cigarette cases infected the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood*, 865 F.2d 395, in which General Motors was arguing, as it had repeatedly argued in the past that it was exempt from common law liability because it had complied with a Federal motor vehicle safety standard - specifically, Standard 208 governing occupant restraints. In a two-to-one decision, with Judge Selya dissenting, the First Circuit explicitly adopted the rationale of *Palmer*, its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim impliedly (but not expressly) pre-empted by the Safety Act, despite Congress' clear statement of anti-pre-emptive intent. *Wood*, 865 F.2d at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, albeit on varying rationales. *See Pokorny*, 902 F.2d 1116 (3rd Cir. 1990); *Kitts*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor*, 875 F.2d 816 (11th Cir. 1989), *cert denied*, 495 U.S. 1065 (1990).

In 1992, however, this Court issued its decision in

Cipollone, 112 S. Ct. at 2608, explicitly rejecting the Third Circuit's (and its sister courts) expansion of the implied pre-emption doctrine. In a portion of the opinion joined by seven member's of this Court, it said:

> In our opinion, the pre-emptive scope of the [two statutes at issue] is governed entirely by the express language in. . . each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

112 S. Ct. at 2618. Thus, *Cipollone* held that the lower courts had erred in finding implied pre-emption of any common law claims involving cigarettes and that only *express* pre-emption analysis should have been employed. *Id.*

The *Cipollone* decision effectively overruled the decisions finding implied pre-emption under the Safety Act. It should have returned the lower courts to their unanimous view that the Safety Act expressly preserves all common law claims. And it probably would have done so, if not for the confusion caused by *Freightliner*.

In *Freightliner*, this Court reviewed the first decision by a federal appeals court or state court of last resort to interpret the Safety Act's pre-emptive effect after this Court's decision in *Cipollone*. In the decision being

reviewed, *Myrick*, 13 F.3d at 1522, the Eleventh Circuit first stated *Cipollone's* teaching broadly, noting "*Cipollone's* clear instruction that when there is an express pre-emptive provision we should not consider implied pre-emption. It later said, however, that "at the very least" *Cipollone* "establishes there is a presumption that a pre-emption clause is a reliable indicium of congressional intent" and that "[e]ven without such a presumption we would be convinced that the express pre-emption provisions of the Safety Act are a reliable indicium of congressional intent." *Myrick*, 13 F.3d at 1525. The Eleventh Circuit concluded that *Cipollone* negated its prior implied pre-emption decision in *Taylor*, that section 1397(k) barred resort to implied pre-emptive analysis under *Cipollone*, and that the Safety Act expressly preserves all common law claims. *Myrick*, 13 F.3d at 1522-28.

In *Freightliner*, 514 U.S. 518 (1995), this Court affirmed on alternative grounds, but issued a decision that has created great confusion as to whether implied pre-emption analysis is appropriate under the Safety Act. Perhaps focussing on the Eleventh Circuit's broadest summary of *Cipollone's* impact, the Court said that the Eleventh Circuit had misread *Cipollone* to hold "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute" and rejected that position as "without merit." *Freightliner*, 115 S. Ct. at 1487. The Court then attempted to clarify the proper approach to pre-emption analysis, saying:

> The fact that an express definition of the pre-emptive reach of a statute "implies" -- i.e., supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express

> clause entirely forecloses any possibility of implied pre-emption... At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

Freightliner, 115 S. Ct. at 1488.

In regard to *Cipollone*, these statements made perfect sense. The two statutes at issue in *Cipollone* contained express pre-emption clauses (but, unlike, the Safety Act no express *anti-pre-emption* clause). The fact that Congress thought to include those express clauses in the statutes did not without more, necessarily mean that Congress also thought of all other aspects of state law that might be pre-empted by the statutes -- and intended to preserve them.

In the Safety Act however, there is more than just an express pre-emption clause. There is an express *anti-pre-emption* clause explicitly preserving all common law claims. In *Freightliner*, however, this Court did not acknowledge that fact. Instead, it simply said the Eleventh Circuit's interpretation of *Cipollone* was "without merit" and then made the statements quoted above. *Freightliner*, 115 S. Ct. at 1487-88. As a result *Freightliner* has created extensive confusion as to whether section 1397(k) precludes a resort to implied pre-emption under the Safety Act.

The confusion caused by the discussion of *Cipollone* in *Freightliner* was massively compounded by the pre-emption analysis actually employed in *Freightliner*. *Cipollone* stressed the importance of focusing on the words Congress used to determine whether express pre-emption exists. In *Freightliner*, however, this Court did not reach the question of whether 15 U.S.C. § 1392(d) expressly pre-

empts common law claims or 15 U.S.C. § 1397(k) expressly preserves them. *Freightliner*, 115 S. Ct. at 1487 n.3. Instead, it rejected express pre-emption solely because section 1392(d), by its terms, only applies, "whenever a Federal motor vehicle safety standard is in effect" with respect to the relevant "aspect of performance" and no such Federal standard was in effect with regard to the aspect of performance (truck stopping distances) at issue in the case. *Freightliner*, 115 S. Ct. at 1147. This has prompted some courts -- including the District Court of Northern Georgia - to hold (incorrectly) that *Freightliner* affirmatively supports a finding of express pre-emption whenever a Federal safety standard is in place, despite the clear words of the savings clause.

In addition, *Cipollone* stressed the importance of focusing on the words Congress used to determine whether resort to implied pre-emption analysis is proper, but *Freightliner* did not follow that step. Instead, without reaching respondents' arguments about the words Congress used, id. at 1487 n.3 (and after saying the Eleventh Circuit misinterpreted *Cipollone* as unduly barring implied pre-emption), the Court rejected the petitioners' pre-emption argument as "ultimately futile" because respondents' common law claims did not "conflict with federal law" sufficiently to warrant a finding of implied pre-emption. *Freightliner*, 115 S. Ct. at 1488. This has prompted some courts to hold (incorrectly) that *Freightliner* mandates resort to -- and even a finding of -- implied pre-emption under the Safety Act.

Thus, while *Freightliner* may have clarified the proper approach to pre-emption analysis in cases like *Cipollone*, where the statutes involved contain only express pre-emption clauses, it has created massive confusion

among the lower courts about the pre-emptive affect of the Safety Act. Only this Court can resolve that confusion. To do so, it should grant review in this case and answer the critically-important federal question presented.

C. Whether the Safety Act Pre-empts Common Law Claims is An Important Recurring Question of Federal Law.

The question of federal law presented by this case is extremely important. It boils down to this: whether courts are free to disregard the argument against pre-emption, contravene Congress' plainly-stated intent, and exempt manufacturers from liability under state common law by judicial decree. Mazda Motor Corporation and its fellow manufacturers agree that the question presented is important. Recently, they jointly urged this Court to decide whether compliance with Standard 208 renders them immune from common law liability. *Ford Motor Company v. Tebbetts,* No. 95-709 (October Term, 1995), Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc. as *Amici Curiae* Supporting the Petition. They simply maintain that the answer is "yes," even though it is "no."

The decision below and the implied pre-emption decisions contravene Congress' plain statement of intent. Congress could hardly have said it more clearly: "Compliance with any Federal motor vehicle safety standard ... shall not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). As the United States explained in its *amicus* brief to this Court in *Freightliner:*

> [U]nder a straightforward reading of Section 1392(d) and Section 1397(k), taken together,

> States are pre-empted from adopting prescriptive safety standards by legislative or administrative action if NHTSA has established a safety standard governing the same aspect of performance... State courts, however, are not precluded by those provisions from entering tort judgments in cases raising the claim that a vehicle or item of equipment was defectively designed with respect to that same aspect of performance.

Freightliner Corp. v. Myrick, No. 94-286 (October Term, 1994), Brief for the United States as *Amicus Curiae* Supporting Respondents, at 16.

If the plain words of the Safety Act left any question as to Congress' intent in regard to common law claims, it would surely be answered by the statute's legislative history. The House Committee, which added section 1397(k) to the Safety Act explained its purpose in clear and unequivocal terms:

> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly* those relating to warranty, contract, and *tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

Given the foregoing, the decision below is plainly in error, as are those cases resorting to implied pre-emption analysis. In both *Cipollone* and *Medtronic*, this Court

found that Congress's enactment of express pre-emption provisions, standing alone, barred resort to implied pre-emption principles, even though the members of the Court disagreed vehemently as to the meaning of the express pre-emption provisions. See *Cipollone*, 112 S. Ct. at 2618; *Medtronic*, 116 S. Ct. at 2250. Here, Congress enacted both an express pre-emption provision and an express anti-pre-emption provision explicitly preserving the aspect of state law at issue. To allow implied pre-emption under these circumstances would render the limitations imposed on implied pre-emption in *Cipollone* and *Medtronic* meaningless -- and make implied pre-emption analysis a tool for wholesale judicial activism and the widespread evasion of Congress's intent.

Moreover, even if implied pre-emption could properly be considered under the Safety Act claims like Petitioner's still would not be pre-empted. There simply is no conflict between plaintiffs' claims and Standard 208. It is true that Standard 208 required all 1990 model-year cars to have, at a minimum, either (1) a manual lap belt and shoulder harness, (2) an automatic belt system providing at least a specified level of protection in head-on crashes, or (3) an airbag or other device providing automatic protection in head-on and angular crashes. It is equally true that Mazda, which chose the second option, could have installed a door-mounted passive restraint system (or for that matter, an airbag) in Bonita Irving's 1990 Mazda MX-6 rather than the automatic shoulder harness and knee bolster it installed, and still have complied with that option under Standard 208. And it is obvious that, if Mazda had taken that step, Bonita Irving's 1990 Mazda MX-6 would have been safer. If, by failing to install a door-mounted passive belt system, Mazda violated Georgia common law and caused Bonita Irving's death, Congress did not intend to exempt Mazda

from liability. Section 1397(k) makes that fact plain.

This Court has repeatedly refused to find that Congress intended to deprive tort victims of common law remedies, even when Congress has not expressly preserved common law claims, saying "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic*, 116 S. Ct. at 2251 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). In this case, Congress did comment and it expressly *preserved* all common law claims. This Court should grant review to ensure that Congress' intent is respected and that Juliette Irving -- and thousands of similarly situated Americans -- are not illegally denied their day in court.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

Robert M.N. Palmer
The Law Offices of
Robert M.N. Palmer, P.C.
205 Park Central EastSuite 820
Suite 511
Springfield, MO 65806
Telephone: (417) 865-3234

Gregory M. Stokes
Gregory M. Stokes & Associates
100 Colony Square
Atlanta, GA 30361
Telephone: (404) 892-0011

Counsel for Petitioners

APPENDIX

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Juliette IRVING, as Guardian of the Persons and Property of Bryana Bashir, and as Administratrix of the Estate of Bonita L. Irving, Deceased, Plaintiff-Appellant,

v.

MAZDA MOTOR CORP., a.k.a. Mazda Motors Corp., f.k.a. Toya Kogyo, Ltd., Mazda (north America), Inc., et al., Defendants-Appellees.

No. 97-8021.

United States Court of Appeals,
Eleventh Circuit.

March 5, 1998.

Before HATCHETT, Chief Judge, and EDMONDSON and COX, Circuit Judges.

EDMONDSON, Circuit Judge:

Plaintiff appeals the district court's grant of summary judgment for Defendants. The district court decided that Plaintiff's state law claims were preempted by federal law. We conclude that Federal Motor Vehicle Safety Standard ("FMVSS") 208, 49 C.F.R. § 571.208, (enacted under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 et seq.) does preempt Plaintiff's state law claims. And, we affirm the grant of summary judgment.

Background

Plaintiff Juliette Irving filed suit against Defendant Mazda Motor Corporation on behalf of her daughter, Bonita Irving. Bonita was killed in a single-car accident while driving a 1990 Mazda MX-6. After her daughter's death, Plaintiff filed this suit claiming that the seat belts in the MX-6 were defectively designed and that Mazda failed to warn consumers adequately of the risks of not utilizing all portions - particularly the manual lap belt portion - of the safety belt system.

The safety belt system used in the Mazda MX-6 included a two-point passive shoulder restraint (automatic shoulder belt) with a manual lap belt. The kind of restraint system was one of three options provided to car manufacturers by FMVSS 208. Plaintiff contends the design represented by this option was defective.

Defendants filed a motion for summary judgment claiming that FMVSS 208 both expressly and impliedly preempts state law (including common-law) claims and that no recovery can be had on a claim based on the use of a design permitted by the federal standards. The district court granted this motion and - concluding that Plaintiff's failure-to-warn claim was dependent upon the design-defect claim - also dismissed Plaintiff's failure-to-warn claim.

Discussion

Whether Plaintiff's state law claims are preempted under the federal law is reviewed by this Court *de novo*. *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1498 (11th Cir.) *cert. granted*, ___U.S.___, 118 S.Ct. 439, 139 L.Ed.2d 337 (1997).

I. Preemption: Defective-Design Claim

The Supremacy Clause of the Untied States' Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Thus, state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (citing *Maryland v. Louisiana*, 451 U.S. 725, 744-46, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981)). And, "common law liability may create a conflict with federal law, just as other types of state law can." *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1122 (3d Cir. 1990); see also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662-64, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993).

Whether federal statutes or regulations preempt state law is "a question of congressional intent." *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257, 1261 (5th Cir. 1992); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, ___ _ ___, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996) ("The purpose of Congress is the ultimate touchstone in every preemption case.") (internal quotations and citation omitted). Congress - through federal laws and regulations - may effectively preempt state law in three ways: (1) express preemption; (2) field preemption (regulating the field so extensively that Congress clearly intends the subject area to be controlled only by federal law); and (3) implied (or conflict) preemption. Defendants claim that the National Traffic and Motor Vehicle Safety Act of 1966 ("the Act") both expressly and impliedly preempts Plaintiff's claims.

A. Express Preemption

"[A] strong presumption exists against finding express preemption when the subject matter, such as the provision of tort remedies to compensate for personal injuries, is one that has traditionally been regarded as properly within the scope of the states' rights." *Taylor v. General Motors Corp.* , 875 F.2d 816, 823 (11th Cir. 1989)[1] (citation omitted). Thus, express preemption clauses must be construed narrowly. *Taylor*, 875 F.2d at 823-24.

Defendants first contend that Plaintiff's design-defect claim is expressly preempted by the preemption clause of the Act. That clause makes this statement:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe

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[1] Our pronouncements in *Taylor* were partially abrogated by *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521-22 (11th Cir. 1994), where we wrote that the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), would not permit an analysis of implied preemption where an express preemption clause existed in the relevant federal law. But, the Supreme Court reviewed *Myrick* on appeal and, although affirming the outcome, stressed that implied preemption is possible despite the presence of an express preemption clause. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-87, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). Thus, *Taylor* is correct and can be used for evaluating preemption of state law.

> or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter....

49 U.S.C. § 30103(b)(1) (formerly 15 U.S.C. § 1392(d). But, the Act also contains a savings clause which provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e) (formerly 15 U.S.C. § 1397(k). Thus, "[t]he question of express preemption is properly analyzed only after considering both § 1392(d) *and* § 1397(k)." *Pokorny*, 902 F.2d at 1120 (citing *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 512-13, 101 S.Ct. 2478, 2492, 69 L.Ed.2d 185 (1981).

In *Taylor*, after reading these two sections together, we determined that the conflict between them made the preemption of common-law claims ambiguous. Thus, the presumption against preemption controlled; and no express preemption could be found. *Taylor*, 875 F.2d at 825.

We also considered express preemption for the Federal Boat Safety Act ("FBSA"), in *Lewis v. Brunswick Corp.*, 107 F.3d 1494. The FBSA contains language similar to that of the National Traffic and Motor Vehicle Safety Act, containing both a preemption clause and a savings clause.[2]

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[2] The pertinent portions of the FBSA read this way:

> [A] State or a political subdivision of a State may not establish, continue in effect, or

Again we (as in *Taylor*) read the preemption clause narrowly and said that the FBSA's preemption clause did not cover common-law claims. *Lewis*, 107 F.3d at 1501. *Taylor* and *Lewis* point to the same conclusion for this case.[3] So, Plaintiff's defective-design claim is not expressly preempted by the Act.

B. Implied Preemption

Conflict preemption exists where state law actually conflicts with federal law, making it impossible to comply with both, or where the stat law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lewis*, 107 F.3d at 1500 (internal quotations and citation omitted).

> enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment ... that is not identical to a regulation prescribed under ... this title.

49 U.S.C. § 4306. The FBSA further provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g)

[3] This conclusion is the same as that reached by other circuits. *See, e.g., Perry*, 957 F.2d at 1264; *Pokorny*, 902 F.2d 787, 789 (10th Cir. 1989) (adopting *Wood v. General Motors Corp.*); *Wood v. General Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1988).

The existence of an express preemption clause does not necessarily preclude the presence of implied preemption. *Freightliner Corp., v. Myrick*, 514 U.S. 280, 286-90, 115 S.Ct. 1483, 1487-88, 131 L.Ed.2d 385 (1995). Thus, if Plaintiff's state law claim conflicts with FMVSS 208 or if her claim would hinder Congress's objectives in passing the Act, the state law will be preempted.

FMVSS 208 directly addresses the kinds of restraint systems permitted to be used by car manufacturers. It allows manufacturers to choose from three options: (1) a complete passive restraint system (automatic seat belts with or without air bags); (2) passive protection for frontal crashes (for example, automatic shoulder belts or air bags) plus manual lap belts for lateral crashes and roll-overs with a seat belt warning system; or (3) manual lap and shoulder belts with a seat belt warning system. FMVSS 208; *Perry*, 957 F.2d at 1260.

Defendants chose the second option - installing two-point passive shoulder restraints with manual lap belts. That Congress specifically intended the standard to give manufacturers a choice should preempt common-law claims that two-point passive shoulder belts, paired with manual lap belts, constitute inherently a design defect. *See Pokorny*, 902 F.2d at 1123 (actual conflict exists with the Act and FMVSS 208 to the extent a claim would stand for a manufacture's choice of an option provided by the standards).

i. An argument made for the first time on appeal.

As we understand the record, Plaintiff's claim in district court was not that a differently designed two-point

system with a manual lap belt would have been without defect.[4] On the contrary, Plaintiff based her claim on the allegation that the option provided in the standards represented inherently a defective design. "Plaintiff allege[d] that the option selected by Mazda is defective." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 12.

Plaintiff, however, seems to argue for the first time in this appeal that different, nondefective designs could have been selected by Defendants under the same regulatory option automatic shoulder belt with manual lap belt. thus, Plaintiff now argues that she is not challenging Defendants' choice of a regulatory option. This argument differs from Plaintiff's argument in the district court.[5] Too often our

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[4] If a claim was asserted that two-point systems (such as that installed in the Mazda MX-6) were not defective in general, but that the specific design selected by Mazda for its two-point system was unreasonably dangerous, preemption would be less clear.

[5] The option selected by Defendants permitted passive protection for frontal crashes - either air bags or passive shoulder harnesses - plus lap belts for lateral crashes. The only alternative designs put forward by Plaintiff in the district court were three-point seat belts, fully automatic belts, and restraint systems with more elaborate warning systems. These alternatives do not fall within the regulatory option exercised by Defendants. A three-point seat belt system would have to be either fully passive (for example, the seat belt is attached to the car door and is positioned upon closing the door) or fully manual (requiring passenger action to position the restraint),

colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them. We cannot allow Plaintiff to argue a different case from the case she presented to the district court. Because Plaintiff failed to make this argument in the district court, we decline to consider it here. *See Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994).

ii. The argument made in district court.

When considering implied preemption, no presumption exists against preemption. "Under the Supremacy Clause of the Federal Constitution, '[t]he

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which would place that system in either of the two options not selected by Defendants. The option exercised by Defendants allowed for a partially passive, partially manual restraint system. For the same reason, a fully automatic belt system also would not fall under the same option selected by Defendants. Finally, the warning systems proposed by Plaintiff would have been different from the warning system specifications set out for the option selected by Defendants, with which specifications Defendants indisputably complied.

In the district court, Plaintiff stated that she was "not suggesting that the options be taken away; rather, Plaintiff alleges that *the option selected by Mazda is defective.*" Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 12 (emphasis added). To sharpen this point more, Plaintiff went so far as to challenge the appropriateness of FMVSS 208. *See id.* at 2 ("[A]lthough the restraint system may comply with the minimum standards, the standards are inadequate and should not impede the progress towards improved designs.").

relative importance of the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Lewis*, 107 F.3d at 1502 (citation omitted).

Because Plaintiff sued Defendants for exercising an option expressly permitted by Congress, a conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design. *Taylor*, 875 F.2d at 827 ("[A] state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'") (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-20, 101 S.Ct. 1124, 1131, 67 L.Ed.2d 258 (1981)). Therefore, Plaintiff's suit against Defendants for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus is preempted.

II. Failure-to-Warn Claim

In addition to granting Defendants' motion for summary judgment on Plaintiff's claim of defective design, the district court also dismissed Plaintiff's failure-to-warn claim. The district court said that "[s]ince plaintiff's defective design claims are preempted, the court will not address plaintiff's failure to warn claim, *as it premised on a defective design.*" District Court Order at 8 n.8 (emphasis added).

Plaintiff argues on appeal that a failure-to-warn claim is separate from and not dependent upon a defective-design claim. As a general statement of law, Plaintiff's proposition is often correct. *See, e.g., Michael v. Norfolk*

Southern Ry. Co., 74 F.3d 271 (11th Cir. 1996) (applying Georgia law); *see also Sheckells v. AGV-USA Corp.*, 987 F.2d 1532, 1533 (11th Cir. 1993) (applying Georgia law); *Stapleton v. Kawasaki Heavy Indus., Ltd.*, 608 F.2d 571, 572-73 (5th Cir. 1979) (applying Georgia law). But, in this case Plaintiff (not the district court or Defendants) tied the claims of defective design and failure of warn together. In Plaintiff's opposition to Defendants' motion for summary judgment, she argued that she would ask the jury to find that "the 1990 Mazda MX-6 equipped with the two-point motorized shoulder belt and manual lap belt option is defective without plaintiff's desired warning."[6] Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 23.

Because Plaintiff's defective-design claim is preempted by FMVSS 208, there was no defect about which to warn. Plaintiff's failure-to-warn claim - which is, in this case, dependent on the preempted defective-design claim - was properly dismissed.

AFFIRMED.

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[6] Plaintiff presented several warning systems as safer alternatives to the system present in the 1990 Mazda. The Mazda warning system included a buzzer, a light indicating a failure to secure the lap belt, and a written warning on the sun visors on both the driver and passenger sides of the car. Plaintiff alleges these warnings were inadequate. But, Plaintiff does not dispute that the warnings provided in the 1990 Mazda fully complied with the federal standards. *See* FMVSS 208 at S7.3; 49 C.F.R. § 571.208, S.5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JULIETTE IRVING, As Guardian of the Person and Property of BRYANA BASHIR, and As Administratrix of the Estate of BONITA L. IRVING, Deceased,	)	
Plaintiff,	)	
vs.	)	Civil Action 194CV2964HTW
MAZDA MOTOR CORPORATION, aka MAZDA MOTORS CORP., fka TOYO KOGYO, LTD., et al.,	)	
Defendants.	)	

ORDER OF COURT

This matter currently is pending before this court on (1) the Mazda defendants' motion for summary judgment, and (2) the Mazda defendants' motion to extend time to file a pretrial order.[1]

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[1] These motions are brought by defendants Mazda Motor Corporation; Mazda Motor of America, Inc.; Mazda (North America), Inc.; and AutoAlliance International, Inc. (collectively, the "Mazda defendants" or "defendants").

DISCUSSION

The Mazda Defendants' Motion for Summary Judgment

1. Facts

On November 19, 1993, plaintiff's decedent, Bonita Irving, was involved in a single-car accident while driving her 1990 Mazda MX-6 on Georgia Highway 54 in Coweta County, Georgia. Ms. Irving was killed instantly when she lost control of her car, it left the rad and rolled over, and she was ejected. There is no allegation that the Mazda defendants are responsible for the vehicle leaving the roadway or rolling over. The car at issue, bearing vehicle identification number 1YVGD31BOL5215786, was manufactured by Mazda Motor Corporation and assembled by AutoAlliance International, Inc. The vehicle was

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These are the only remaining defendants in this case.

equipped with an occupant restraint system that included a two-point motorized shoulder belt and manual lap belt. Plaintiff alleges that the seat belt system was defectively designed and that defendants failed to adequately warn of the alleged defect.

2. Summary Judgment Standard

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1356 (11th Cir. 1986); Warrior Tombigbee Transp. Co. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed.R.Civ.P. 56(c). To determine if the moving party meets its burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion. Carlin Communication, 802 F.2d at 1356; Sweat v. Miller Brewing co., 708 F.2d 655, 656 (11th Cir. 1983).

The Supreme Court has addressed the burdens of proof which each party must carry on a motion for summary judgment and stated that:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986) (quotation omitted).

The nonmoving party is required to identify specific facts which demonstrate that there is a genuine issue for trial and may not rest on the allegations or denials in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). However, in order to survive a motion for summary judgment, the non-moving

party need only present evidence form which a jury might return a verdict in his or her favor. If he or she does so, there is a genuine issue of fact that requires a trial. Id. at 257, 106 S. Ct. at 2514.

3. Analysis

The Mazda defendants move for summary judgment on the grounds that federal law preempts plaintiff's claims. In the alternative, the Mazda defendants' state that plaintiff's claims have no basis under Georgia state law.

On the preemption issue, defendants do not dispute that there is a presumption against preemption./ See, e.g., Maryland v. Louisiana, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129 (1981). Defendants note, however, that the issue of preemption is a question of law for the court to decide. Pokorny v. Ford Motor Co., 902 F.2d 1116, 1119 (3rd Cir.), cert. denied 498 U.S. 853, 111 S.Ct. 147 (1990). Defendants argue that 15 U.S.C. § 1392(d) of the National

Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. § 1381 et seq., and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 ("FMVSS" or "Standard" 208) impliedly preempt plaintiff's claims.[2] Section 1392(d) provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The Safety Act also states that compliance with a federal motor vehicle safety standard "does not exempt any person from any liability under common law." 15 U.S.C. §

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[2] Defendants appear to make an express preemption argument also, but such an argument has been rejected by the Eleventh Circuit and other courts, thus will not be addressed.

1397(k). This is known as the "savings clause."[3]

In Montage by Montag v. Honda Motor Co., Ltd., 75 F.3d 1414, 1417 (10th Cir.), cert. denied, 117 S.Ct. 61 (1996), the court rejected the argument that, under Cipollone v. Liggett group, Inc., 505 U.S. 504, 112 S.Ct. 2608 (1992), courts may not consider implied preemption where Congress has provided and express preemption clause. As noted in Montag, in Freightliner Corp. v. Myrick, ___ U.S. ___ 115 S.Ct. 1483 (1995) the Supreme Court "held that the existence of an express preemption provision does not preclude an implied preemption analysis. . . . At best, an express preemption clause supports the inference that no implied preemption exists." Montag, 75

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[3] Sections 1392 and 1397 were repealed on July 5, 1994, and replaced by 49 U.S.C. § 30103(b)(1) and (e), respectively. The new provisions in § 30103 are similar to the repealed ones. Since the parties have not addressed this change in law or its significance, if any, to this case, and it appears that the analysis of defendants' motion would not be altered, the court will not further discuss this change.

F.3d at 1417 (citations omitted). "Although not explicitly stated, the Court clearly believed that the express preemption clause of the Safety Act did not preclude implied preemption analysis." Id.[4] Thus, the court rejects plaintiff's position that implied preemption analysis is inappropriate.

With respect to the issue of implied preemption, the Supreme Court stated in Myrick,

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Electric co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-2275, 110 L.Ed.2d 65 (1990), or when state

[4] While not crucial to the court's ruling, the court notes that defendants incorrectly represented to the court in their June 10, 1996 reply brief that the Supreme Court petition for certiorari filed by Ford Motor Co., in Tebbetts v. Ford Motor Co., 140 N.H. 203, 665 A.2d 345 (1995) was pending (defendants state the court in Tebbetts misapplied Cipollone and Myrick). In fact, the Court denied Ford's petition on January 16, 1996 and denied a petition for rehearing on February 26, 1996. In any event, the court is not bound by, and has not considered, Tebbetts.

> law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements." *id.*, at 79, 110 S.Ct., at 2275, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Myrick, 115 S.Ct. at 1487 (emphasis added).

In Myrick, a case involving anti-lock braking systems ("ABS"), the court rejected the Defendants' implied preemption argument on the grounds that plaintiff's common law claims do not conflict with federal law -- more specifically, Defendants certainly can comply with both federal and state law "because there is simply no federal standard for a private party to comply with." Id. at 1488. In other words, neither the Safety Act nor its regulations regulate the use of ABS devices. Id.

In the instant case, however, plaintiff's claims surround an allegedly defectively designed seat belt

system.[5] In contrast to ABS devices, FMVSS 208 addresses seat belts and air bags. The United States Court of Appeals for the Third Circuit has found that state common law claims based on a lack of air bags are preempted if the vehicle is equipped with an alternate protection system permitted by the Safety Act. Pokorny v. Ford Motor Co., 902 F.2d 1116, 1123 (3rd Cir.), cert. denied, 498 U.S. 853, 111 S.Ct. 147 (1990). Moreover, plaintiff acknowledges that she is not making a "no air bag claim."

With respect to seat belts, FMVSS 208 provides that manufactures have various options: (1) a front/angular automatic protection system (49 C.F.R. §

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[5] Plaintiff states that she has a strict liability claim and a failure to warn claim (thought plaintiff's complaint also contains a negligence claim and a breach of warranty claim). Since the court's treatment of the latter two claims apparently would be the same as the treatment of the former two claims, the court will not specifically address the negligence claim and a breach of warranty.

571.208, S4.1.2.1); (2) head-on automatic protection system (49 C.F.R. § 571.208, S4.1.2.2); or (3) lap and shoulder belt protection system with belt warning (49 C.F.R. § 571.208, S4.1.2.3). In addition, FMVSS 208, S4.5.3 provides: "[A] seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option."

Plaintiff admits in her response brief that "[i]t is undisputed that FMVSS 208 permits (but does not require) manufacturers to select a passive restraint system choice."[6] Still, Plaintiff argues that -- while the car at issue

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[6] Passive restraints include air bags or "passive" seatbelts. "Passive seatbelts, also called "automatic" seatbelts, move into place automatically when a passenger enters a vehicle and closes the door." State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 208 (D.C. Cir. 1982), vacated on other grounds, 463 U.S. 29, 103 S.Ct. 2856 (1993). Passive restraint systems have been defined as "protective systems that require 'no action by

may have technically complied with the applicable federal standards -- the vehicle did not comply with the "spirit" of the applicable federal standards. Plaintiff also opines that these standards are inadequate. Plaintiff's position is that an alternative design was available that would have improved the crash-worthiness of the car. Plaintiff suggests a three-point manual seat belt with an air bag, or a three-point passive system. Plaintiff also suggests chimes and warnings in addition to those in the Mazda at issue. In sum, plaintiff states that there should be no implied preemption where -- as here, plaintiff contends -- it is possible to com.ply with the applicable federal standards and state tort law.

While implied preemption exists when it is impossible to comply with both federal and state law, Myrick, 115 S.Ct. at 1487, the converse is not necessarily

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vehicle occupants.'" Id. at 210.

true. In other words, even if it is possible to comply with both, implied preemption is appropriate "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (quotation omitted). In the instant case, the occupant restraint system in the Mazda vehicle at issue included a two-point motorized shoulder belt and manual lap belt. The uncontroverted evidence -- most notably, the affidavit of Jeffrey R. Miller and plaintiff's admissions -- mandates that the seat-belt system at issue complies with FMVSS 208.[7] As defendants, note, allowing plaintiff to utilize Georgia state law to bring a defective design claim would present various obstacles to the purposes and objectives for FMVSS 208 -- such as punishing a manufacturer for exercising an option given by federal regulations. Defendants also cite the destruction of uniformity and interference with the

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[7] The court declines plaintiff's request that the court find this regulation inadequate or otherwise unenforceable.

federally-mandated phase-in. See only O'Bryan v. Volkswagen of America, Inc, 838 F.Supp. 319, 324 (W.D. Ky. 1992) (the plaintiff's state law claims against the defendant manufacturer for failing to utilize a manual lap belt were impliedly preempted); Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), cert. denied., 494 U.S. 1065, 110 S.Ct. 1781 (1990); Heath v. General Motors Corp., 756 F.Supp. 1144 (S.D. Ind. 1991). thus, plaintiff's claims in this case are impliedly preempted.[8]

B. The Mazda Defendants' Motion to Extend Time to File Pretrial Order

The Mazda defendants move this court for an extension of time to file a proposed consolidated pretrial order until thirty (30) days after the court rules on

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[8] Since plaintiff's defective design claims are preempted, the court will not address plaintiff's failure to warn claim, as it is premised on a defective design. Nor will the court discuss whether plaintiff's claims have a basis under Georgia state law.

defendants' motion for summary judgment. Plaintiff does not oppose defendants' motion for summary judgment. Plaintiff does not oppose defendants' request. Since it appears that this Order disposes of all of plaintiff's claims, thought, the court DISMISSES as MOOT the Mazda defendants' motion to extend time to file pretrial order.

CONCLUSION

Therefore, after due consideration, this court (1) GRANTS the Mazda defendants' motion for summary judgment and DIRECTS that the clerk DISMISS this case and (2) DISMISS as MOOT the Mazda defendants' motion to extend time to file pretrial order.

SO ORDERED. this 22nd day of November, 1996.

/s/ Horace T. Ward
HORACE T. WARD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8021

JULIETTE IRVING, as Guardian of the Persons and Property of BRYANA BASHIR, and as Administratrix of the Estate of BONITA L. IRVING, Deceased,

Plaintiff-Appellant,

versus

MAZDA MOTOR CORP. a.k.a. Mazda Motors Corp. f.k.a. Toyo Kogyo. Ltd.,
MAZDA (NORTH AMERICA), INC.,
et als,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d ___).

Before: HATCHETT, Chief Judge, EDM
COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED ;
of this panel nor other judge in regular activ
Court having requested that the Court
rehearing en banc (Rule 35, Federal Rule
Procedure; Eleventh Circuit Rule 35-5), th
of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

(2)

No. 98-540

FILED
OCT 30 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JULIETTE IRVING, as Guardian of the Person and Property of Bryana Bashir, and as Administratrix of the Estate of Bonita L. Irving, Deceased,
Petitioner,

v.

MAZDA MOTOR CORPORATION; MAZDA (NORTH AMERICA), INC.; MAZDA MOTOR OF AMERICA, INC.; and AUTOALLIANCE INTERNATIONAL, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

LANNY B. BRIDGERS *
ANDREW T. BAYMAN
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600
Attorneys for Respondents
* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

39 pp

QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the Eleventh Circuit that held petitioner's tort claim, which alleged that respondents' 1990 Mazda MX-6 was defectively designed because it was equipped with a "passive" occupant restraint system expressly permitted to be used under the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 and because it allegedly failed to warn that the "passive" occupant restraint system permitted under federal law constituted a "defect" under Georgia law, was preempted by the National Traffic and Motor Vehicle Safety Act because the claim conflicted with Federal Motor Vehicle Safety Standard 208, even though (1) the Eleventh Circuit's decision is consistent with this Court's preemption decisions and all other federal courts of appeals' decisions addressing this issue; (2) the Eleventh Circuit's decision is consistent with both Congress' intent as expressed in 15 U.S.C. §§ 1392(d) and 1397(k), and the elementary rule of statutory construction which directs that an act cannot be held to destroy itself; and (3) the factual context to which this Court's decision would be limited is an ephemeral one.

RULE 29.6 STATEMENT

MAZDA MOTOR CORPORATION

(1) Mazda Motor Corporation has no parent company.

(2) Mazda Motor Corporation owns the following subsidiaries:

Mazda Motor of America, Inc.
Mazda Motors (Deutchland) GmbH
Mazda Canada Inc.
Mazda Australia Pty. Ltd.
Eunos Inc.
Autozam Inc.
Mazda Chuhan Co., Ltd.
Kurashiki Kako Co., Ltd.
Mazda Credit Corporation
Malox Co., Ltd.
Toyo Advanced Technologies Co., Ltd.
AutoAlliance International, Inc.
AutoAlliance (Thailand) Company Limited
Ford Sales Japan Ltd.

MAZDA (NORTH AMERICA), INC.

(1) Mazda (North America), Inc.'s parent company was Mazda Motor Corporation until Mazda (North America), Inc. ceased to exist on October 1, 1997.

(2) Mazda (North America), Inc. did not own any nonwholly owned subsidiaries as of September 30, 1997.

MAZDA MOTOR OF AMERICA, INC.

(1) Mazda Motor of America, Inc.'s parent company is Mazda Motor Corporation.

(2) Mazda Motor of America, Inc. owns no subsidiaries.

AUTOALLIANCE INTERNATIONAL, INC.

(1) AutoAlliance International, Inc.'s parent companies are Mazda Motor Corporation and Ford Motor Company.

(2) AutoAlliance International, Inc. owns no subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-540

JULIETTE IRVING, as Guardian of the Person and Property of Bryana Bashir, and as Administratrix of the Estate of Bonita L. Irving, Deceased,

Petitioner,

v.

MAZDA MOTOR CORPORATION; MAZDA (NORTH AMERICA), INC.; MAZDA MOTOR OF AMERICA, INC.; and AUTOALLIANCE INTERNATIONAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

At bottom, Petitioner asks this Court to review one painfully mundane question—whether, when a proposed state common law standard conflicts with federal law by penalizing a defendant for doing precisely that which it was authorized to do under federal law, the Supremacy Clause of the Constitution renders that proposed state law "void" and "without effect." (*See* Pet. at 11-18). Petitioner argues that the Supremacy Clause may not operate as its plain words suggest in the context of the

National Traffic and Motor Vehicle Safety Act ("the Safety Act") and Federal Motor Vehicle Safety Standard ("FMVSS") 208, which sets forth permissible occupant restraint systems, because this Court has directed that express preemption clauses should be construed narrowly and because the Safety Act contains a so-called "savings clause" that Petitioner believes should preserve state law that conflicts directly with the Safety Act and regulations promulgated under it.

The true question presented by Petitioner for review and answered adversely by this Court time and again is not deserving of the Court's discretionary powers. Nor are the merits of Petitioner's arguments deserving of the Court's consideration. The Court of Appeals below correctly held that Petitioner's claim alleging that the automatic shoulder belt and manual lap in the Mazda MX-6 constituted a defect was impliedly preempted where federal law specifically authorized Mazda to install an automatic shoulder belt and manual lap as a means of complying with the Safety Act and FMVSS 208. This Court repeatedly has applied the principle that "a state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-20 (1981). It need not waste its discretionary powers repeating itself here.

STATEMENT OF THE CASE

A. The Safety Act and FMVSS 208

Congress in 1966 determined that, given the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," the country needed motor vehicle standards that were "strong and adequately enforced," and "uniform throughout the country." S. Rep. No. 89-1301 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720; *see* H.R. Rep. No. 89-

1779, at 17 (1966). Accordingly, Congress enacted the Safety Act, 15 U.S.C. §§ 1381-1431. The Act directs the Department of Transportation (the "Department"), and its subdivision, the National Highway Traffic Safety Administration ("NHTSA") to issue Federal Motor Vehicle Safety Standards that are "practicable . . . meet the need for motor vehicle safety," and "carry[] out the purposes of [the Act]." 15 U.S.C. § 1392(a), (f) (1966).[1] Federal Motor Vehicle Safety Standards must "prevent any unreasonable risk of death or injury" in the event of an accident. 15 U.S.C. § 1391(1) (1966).

FMVSS 208 sets forth federal performance requirements for the protection of automobile occupants involved in crashes. Its stated purpose "is to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes, *and by specifying equipment requirements for active and passive restraint systems.*" 49 C.F.R. § 571.208, S2 (1996) (emphasis added). Toward this end, NHTSA devised a regulatory scheme within FMVSS 208 that encouraged manufacturers in the 1990 model year to provide the public with a choice of several specified restraint options. These options served the purposes of the Safety Act by reducing injuries via injury criteria, striking the desired degree of uniformity to satisfy the demands of interstate commerce, allowing for the type of flexibility that fosters research and development of improved restraint systems, and increasing consumer acceptance of passive restraints.

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[1] Congress declared that because the purpose of the Act was to reduce deaths and injuries to persons resulting from motor vehicle accidents, it was "necessary to establish motor vehicle safety standards for motor vehicles and [motor vehicle] equipment in interstate commerce [and] to undertake and support necessary safety research and development." 15 U.S.C. § 1381 (1966).

Quite deliberately, the scheme within the FMVSS 208 applicable to the 1990 Mazda MX-6 did not mandate that manufacturers choose one form of passive restraint over another. *See* 49 Fed. Reg. 28962, 28999-29000 (1984); 49 C.F.R. § 571.208, S4.1.2.1 through S4.1.2.3. (1975).[2] Rather, it set forth performance requirements for specified passive restraint options, and with respect to passive belts, provided for a very specific system—namely, a manufacturer could install "a seat belt assembly that requires no action by vehicle occupants" (an automatic belt system) "to meet the crash protection requirements of any [of the first three options] and in place of any seat belt assembly otherwise required by that option." 49 C.F.R. § 571.208, S4.5.3 (1975). Thus, FMVSS 208 authorized the installation of automatic belts that met the performance requirements of any of its three options, and in place of any manual belts at all. This is exactly what the Mazda defendants did when they installed the automatic shoulder belt with a manual lap belt in the 1990 Mazda MX-6.

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[2] Congress in 1991 amended the Safety Act to require air bags in all passenger cars. Congress granted the Secretary until September 1, 1998, to promulgate an amendment to FMVSS 208 requiring air bags in 95% of cars built in the 1997 model year, and 100% of cars built in the 1998 model year. *See* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 2508, 105 Stat. 1914. Congress made clear, however, that its judgment concerning the phase-in of air bags was not to change preemption law with respect to past regulations. H.R. Rep. No. 102-404, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783.

Previously in 1984, then-Secretary of Transportation Elizabeth Dole implemented a rule mandating a "phase-in" of driver's side passive restraints over time, requiring that 10% of 1987 model year vehicles be equipped with passive restraints; 25% of 1988 model year vehicles; 40% of 1989 model year vehicles; and 100% of 1990 model year vehicles. 49 Fed. Reg. 28999-29000. Although the phase-in was in its final stage when this Mazda MX-6 was built, the rule granted manufacturers the option as to what form of passive restraint to install, specifically including the option to install an automatic shoulder belt system with or without manual lap belts.

The Mazda defendants were not at a loss for company in choosing this option. Toyota, Ford, General Motors, Chrysler, and Volkswagen, among others, all used an automatic shoulder belt with or without a manual lap belt on all or some models during the phase-in period. Volkswagen and Toyota, in particular, pioneered the system and paved the way for its widespread popularity.

1. ***The Volkswagen and Toyota-Cressida Systems***

The second option under the applicable FMVSS 208 authorizes passive restraints that, together with manual belts, meet the performance requirements of 49 C.F.R. § 571.208, S5.1. This section sets forth injury criteria for vehicles hitting a fixed collision barrier at thirty miles per hour, at any angle up to thirty degrees.

In 1973, Volkswagen developed a passive shoulder belt system which, with knee bolsters and without any manual lap belt, met those injury criteria. In 1974, NHTSA ruled that Volkswagen's passive belt system was expressly authorized under FMVSS 208's second option. *See* 39 Fed. Reg. 3834 (1974). The NHTSA pointed out that 49 C.F.R. § 571.208, S4.5.3 specifically permitted the use of the Volkswagen system "to meet the perpendicular impact protection requirements of option two." *Id.* As for the lack of a manual lap or lap/shoulder belt, NHTSA likewise pointed out that S4.5.3 expressly permitted the Volkswagen automatic belt system "to replace the required [manual] seat belt assemblies." *Id.* In fact, NHTSA concluded that the second option existed "to accommodate the introduction of passive restraints like Volkswagen's." *Id.*

Thus, ever since the introduction of Volkswagen's system, FMVSS 208 specifically has authorized an automatic shoulder belt that meets its performance requirements, with or without any type of lap belt—manual or automatic. This rule has never changed. Indeed, on Septem-

ber 10, 1990, NHTSA reaffirmed that a restraint system consisting of an automatic shoulder belt and meeting the applicable performance requirements "[is] not required to provide lap belts either as part of the automatic belt or as a separate manual belt." (Br. of Defs.-Appellees App. A (Letter from Paul Jackson Rice, Chief Counsel, National Highway Transportation Safety Administration, to Rembert Ryals, Esq. (Sept. 10, 1990).)[3]

Toyota followed in 1980 and 1981, by developing an automatic shoulder belt system with knee bolsters, like the Volkswagen system, but which also included a manual lap belt for still more protection. It also made the shoulder belt motorized to increase consumer acceptability, and therefore, consumer usage. The Toyota Cressida's automatic shoulder belt had a dramatically higher usage rate than traditional, manual restraint systems and met the dynamic crash and injury criteria of FMVSS 208 even without the lap belt. As a result, the NHTSA in 1980 gave the system's inventor, Masanao Motonami, its Safety Award For Engineering Excellence for his significant contribution to automotive safety, and in particular, for his design of the Cressida's automatic shoulder belt system. Significantly, the NHTSA in 1984 reported that the usage rate for this system was over ninety percent, higher than any other automotive restraint system. *See* 49 Fed. Reg. 28983-84.

2. *The U.S. Department of Transportation's Approval of These Systems*

In the meantime, between 1976 and 1984, each U.S. Secretary of Transportation reaffirmed FMVSS 208's op-

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[3] The NHTSA reaffirmed this finding again in 1992. The NHTSA's Chief Counsel found that because Toyota's system conformed to the performance and design requirements of FMVSS 208, it was expressly permitted under FMVSS 208. (*See* Br. of Defs.-Appellees App. C (Letter from Pauul Jackson Rice, Chief Counsel, National Highway Traffic Safety Administration, to Robert S. McLean, Esq. (June 5, 1992)).)

tions, including the passive restraint option eventually installed in the 1990 Mazda MX-6.

First, Secretary William Coleman in 1976 undertook a comprehensive study of passive and active restraints. Although he determined that it was not appropriate to mandate any form of passive restraints, he nonetheless reaffirmed the manufacturer's right to comply with the requirements of any of FMVSS 208's original three options by means of a passive belt system, specifically including the Volkswagen automatic shoulder belt system with knee bolsters. 41 Fed. Reg. 24070, 36494 (1976); 42 Fed. Reg. 5071 (1977). Indeed, he noted that, to date, only "two passive restraint systems" appeared workable—"air bags and the [Volkswagen] shoulder belt and knee bolster system." 41 Fed. Reg. 24070 n.2, 24072 (1976).

In 1977, Secretary Brock Adams issued a prospective FMVSS 208 requiring some form of passive restraints to be phased into cars beginning with the model year 1982. "[T]he choice of which system to install was left to the manufacturers," however. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm,* 463 U.S. 29, 37 (1983). Secretary Adams also reaffirmed the manufacturer's right to comply with the requirements of any FMVSS 208 passive restraint option by way of an automatic shoulder belt system; he noted that 65,000 Volkswagens were equipped with that system, and lauded it as "a proven means of meeting a passive restraint requirement." 42 Fed. Reg. 34295 (1977).

Secretary Andrew Lewis followed by delaying the mandatory passive restraint phase-in for one year, 46 Fed. Reg. 12033, 12034; 46 Fed. Reg. 21174, 21174-75 (1981), and then rescinding that decision, 46 Fed. Reg. 53419, 53425 (1981). This Court reviewed that rescission decision and, in 1983, remanded it, thereby setting the stage for issuance of Secretary Dole's "final rule," the

version of FMVSS 208 applicable to Petitioner's decedent's 1990 Mazda MX-6. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm*, 463 U.S. 29 (1983).

On remand, Secretary Elizabeth Dole undertook a comprehensive review of all restraint systems, 49 Fed. Reg. 28962, 28962-63, 28984-86, 28991, 28996 (1984), and reached a "final rule." *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 478 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). The rule called for a phase-in of passive restraint systems over time. Although it did not require manufacturers to install any one kind of passive restraint, it did require some kind of passive restraint in 10% of cars built in the 1987 model year, 25% of cars built in the 1988 model year, 40% of cars built in the 1989 model year, and 100% of the cars built in the 1990 model year (the year in which plaintiff's decedent's Mazda MX-6 was built). 49 Fed. Reg. 28962, 28999-29000.

Secretary Dole determined not to mandate any particular form of passive restraint at any time, during the phase-in or after. She reasoned that each passive restraint system had advantages and disadvantages. For example, air bags had a variety of "technical problems," and were expensive, while automotive belts cost significantly less. 49 Fed. Reg. at 29001. Moreover, she was concerned about "public acceptability" of mandatory passive restraints, given the public's earlier reaction to a since-abandoned "ignition interlock" system. *Id.* Public acceptability would be enhanced, she concluded, by authorizing manufacturers to install different restraint systems, so that consumers could choose among them. *Id.* at 28997, 29001.[4] Secretary Dole concluded that mandating a single type of

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[4] In an eerily prescient statement given some in the public's more recent perception of air bags, Secretary Dole remarked that "[u]nder the rule being issued, if people have concerns about air bags, they can purchase automobiles that use automatic belts." 49 Fed. Reg. at 29001.

passive restraint was not in the public interest, because it would risk "killing or seriously retarding development" of other systems. *Id.* at 29001.

Accordingly, Secretary Dole believed it important to provide "latitude" to the industry with respect to what passive restraints to install in cars; "flexibility" was the benchmark. *Id.* at 28997, 29000. Thus, manufacturers were to have the option to comply with FMVSS 208's passive restraint requirement with any adequate technology. *Id.* at 28997. That specifically and prominently included the option to choose the Volkswagen's automatic shoulder belt system without a manual lap belt, and the Cressida's automatic shoulder belt system with a manual lap belt. Indeed, the Secretary noted that (1) those systems were the only systems in significant use with a proven track record, *id.* at 28965; (2) their usage rates were high, *id.* at 28983-84; (3) they were relatively inexpensive, *id.* at 28989-90; and (4) they were available "immediately," of particular importance during the phase-in, *id* at 28999.

In sum, until air bags were mandatory in all vehicles with model year 1998, FMVSS 208 always permitted manufacturers the option of choosing what passive restraint, if any, to install in their vehicles. *See Public Citizen v. Steed*, 851 F.2d 444, 448 n.5 (D.C. Cir. 1988). Secretary Dole's final version of FMVSS 208 granted manufacturers that same option, and specifically included the highly-commended option to install the Cressida's automatic shoulder belt system with a manual lap belt. The 1984 version of FMVSS 208 was upheld in *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 487-89 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

3. *The Passive Restraint System in the 1990 Mazda MX-6*

Petitioner's decedent's 1990 MX-6 was built during the initial passive restraint phase-in. Respondents exercised the option that FMVSS 208 specifically granted them, and

installed the automatic shoulder belt system with knee bolsters and a manual lap belt that Toyota had developed. Petitioner has asked the district court, the Eleventh Circuit, and now this Court, to declare that system unlawful, notwithstanding Congress' and NHTSA's express authorization of that system and their reasons for authorizing it.

B. Factual and Procedural Background

The one-vehicle accident that precipitated this action occurred on November 19, 1993, when Petitioner's decedent, Bonita L. Irving, was driving her 1990 Mazda MX-6 at high speed on Highway 54 in Coweta County, Georgia. Ms. Irving lost control of her car, allowing it to veer off the highway and roll multiple times. While the car rolled violently, Ms. Irving was ejected; she died instantly upon hitting the ground.

Ms. Irving's Mazda MX-6 was equipped with an automatic restraint system consisting of a motorized or automatic shoulder belt that moved into place around the driver when the driver closed the door and turned the ignition, a device called a "knee bolster" to restrain the lower body's forward movement in a frontal collision, and a manual lap belt. Federal Motor Vehicle Safety Standard 208 expressly granted automobile manufacturers the option of installing an automatic shoulder belt with, or even without, a manual lap belt. *See* 49 C.F.R. § 571.208, S4.1.2.1, S4.5.3 (1988); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 766 (11th Cir. 1998).

Petitioner brought this action claiming that the occupant restraint system used in the MX-6 was defectively designed. Even though FMVSS 208 explicitly authorized a system consisting of an automatic shoulder belt with or without a lap belt, Petitioner alleged that Georgia state law required that the restraint system include a fully passive lap/shoulder (a "three-point") belt or a manual lap/shoulder belt with an air bag. *Irving*, 136 F.3d at 769 n.5.

Once the parties completed discovery in the district court, Respondents moved for summary judgment on the ground that Petitioner's claims were expressly and impliedly preempted. Respondents argued that Petitioner's claims were expressly preempted because Petitioner sought to impose state safety standards that differed from, and in fact, directly conflicted with, applicable federal standards. Respondents also argued that Petitioner's proposed common law standard, as defined by the uncontroverted facts, was impliedly preempted because it would interfere with the methods chosen by Congress and NHTSA to achieve the Safety Act's objectives.

Petitioner argued that neither express nor implied preemption was appropriate. First, Petitioner argued that the Safety Act's language does not support express preemption. Second, invoking the Court's decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), Petitioner argued that implied preemption was foreclosed as a matter of law.

The district court granted Respondents' motion for summary judgment on November 22, 1996. As a preliminary matter, the district court rejected Petitioner's argument that *Cipollone* prevented it from engaging in implied preemption analysis and stated that it would not address Respondents' express preemption argument. (Pet. App. at A15 (Dist. Ct. Order at 4 n.2, 5).) The court then went on to determine that Petitioner's proposed common law standard would, for a variety of reasons, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and was thus impliedly preempted by the Safety Act. (*Id.* at 7-8 (internal quotations and citations omitted).) Petitioner's appeal to the Court of Appeals for the Eleventh Circuit followed.

C. The Eleventh Circuit's Decision

On appeal, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of Respondents, concluding that "[b]ecause [Petitioner] sued [Respondents] for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law if [Petitioner] goes forward with this claim of defective design." (Pet. App. at A10.)[5] Her claims were therefore preempted under the doctrine of implied conflict preemption, the court found. (*Id.* at A10-11.)

In reaching this conclusion, the court relied upon two well-founded principles that have long been adhered to by this Court. First, the Eleventh Circuit made no distinction between "law" emanating from a legislative or administrative body and "law" emanating from judgments and decisions of courts. It rightfully held that "common law liability may create a conflict with federal law, just as other types of state law can." (Pet. App. at A3 (internal quotations and citations omitted).) Second, while engaging in an analysis of implied conflict preemption, it did not forge a "presumption against preemption" where, by definition, the Supremacy Clause does not permit one. (*Id.* at A9-10.) That is, while the Eleventh Circuit recognized that a "presumption against preemption" may be appropriate in defining the scope of an express preemption provision, it nonetheless noted that where a conflict exists between state and federal law, the Supremacy Clause demands that the state law yield—that the state law be found, as this Court explained in *Maryland v. Louisiana*, 451 U.S. 725, 746-47 (1981), "void" and "without effect." *See also M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 427 (1819).

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[5] Petitioner's appendices overlap at A10 and A11. That is, the last two pages of the Eleventh Circuit's opinion appear at A10 and A11, as do the first two pages of the District Court's Order. Unless otherwise noted, Respondents' citation to A10 or A11 will refer to the Court of Appeals' decision.

REASONS FOR DENYING THE PETITION

A. The Eleventh Circuit's Decision Is Correct And Consistent With Other Federal Appellate Courts' Decisions on Preemption.

All federal Courts of Appeals to consider the issue unanimously have held that a proposed state common law standard that is not identical to, or conflicts with, an applicable FMVSS is preempted under the Safety Act. *See Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998) (finding plaintiff's claim that the restraint system should have consisted of an automatic three-point belt or a manual three-point belt with an air bag impliedly preempted); *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997), *cert. denied*, —— U.S. ——, 118 S. Ct. 697 (1998) (holding non-identical and conflicting state common law standard on windshield retention strength expressly preempted); *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997) (finding cause of action based on failure to install air bags expressly preempted); *Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 61 (1996) (impliedly preempting no air bag claim); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) (holding plaintiff's claim that the vehicle should have been equipped with a fully automatic seat belt or an air bag preempted under the doctrine of conflict preemption); *Taylor v. General Motors Corp.*, 875 F.2d 816(11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (holding no air bag claim impliedly preempted because it prohibited the exercise of a federally-granted option);[6] *Kitts v. General*

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[6] Petitioner makes the disingenuous argument that the Eleventh Circuit's holdings in *Irving* and *Taylor* represent not the law of the circuit, but the whims of the particular panels. (Pet. at 9 (citing *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139 (11th Cir. 1996).) Petitioner is wrong. Neither the availability nor the propriety of implied conflict preemption was before the court in *Doyle*. Rather, the language relied upon by Petitioner is dictum, and inaccurate dictum, at that. *See Doyle*, 81 F.3d at 141 (relying

Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (impliedly preempting no air bag claim because it would conflict with FMVSS 208); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) (finding implied preemption of claim alleging failure to install an air bag).

Moreover, while this Court has not addressed the precise and narrow factual question of whether a manufacturer's compliance with the federally-approved option of an automatic shoulder and manual lap belt preempts a state common law claim seeking to impose liability based upon the manufacturer's failure to choose a different option, the Eleventh Circuit's decision is in harmony with this Court's decisions addressing analogous issues. *See American Tel. and Tel. Co. v. Central Office Tel., Inc.*, —— U.S. ——, 118 S. Ct. 1956, 1962-65 (1998) (preempting state law claims that sought to bar activity authorized by federal statute); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31-38 (1996) (preempting state law that prohiibted activity expressly permitted by federal statute); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-90 (1995) (finding no implied preemption when no FMVSS existed with which plaintiff's proposed common law standard could conflict); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-76 (1993) (holding that plaintiff's proposed common law standard basing tort liability on a train speed specifically permitted by an applicable

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upon this Court's affirmance of the Eleventh Circuit's *judgment* in *Feightliner Corp. v. Myrick*, 514 U.S. 280 (1995), for the proposition that standards promulgated under the Safety Act may never preempt common law claims). Not only did the Eleventh Circuit in *Doyle* misread this Court's decision in *Freightliner*, but once the Eleventh Circuit remanded *Doyle*, the District Court found plaintiff's claims impliedly preempted. *Doyle v. Volkswagenwerk Aktiengelellschaft*, No. 91:CV-1926A-JEC (N.D. Ga. Sept. 29, 1998). Thus, plaintiffs' claims in Georgia are not vulnerable to conflicting outcomes—regardless of the court and regardless of the appellate court panel.

federal standard was preempted); *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (finding preemption of common law claim seeking to prohibit use of due-on-sale clause explicitly permitted by federal statute); *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) (holding that a state could not use "the threat of damages" to prevent the defendant from doing that which the federal agency specifically allowed under its duly-delegated authority).

1. ***The Court of Appeals Correctly Found That The Safety Act's Provision Negating A "Government Standards" Defense As A Matter of Federal Law Did Not Preclude Implied Preemption Analysis.***

Contrary to Petitioner's contentions, the Court of Appeals was correct in engaging in an implied analysis after declining to find Petitioner's claims expressly preempted. The Safety Act's provision relating to the availability of compliance with federal standards as an affirmative defense to common law claims does not, as Petitioner argues, preclude implied preemption analysis.[7] Petitioner attempts to argue that because the Court of Appeals did not find a sufficient expression of congressional intent to expressly preempt her claims, the court could not, and should not, have engaged in implied preemption analysis. This argument must fail.

This Court in *Freightliner* made clear that simply because a common law claim is found to be unaffected by an express preemption clause, a court is not free to disregard otherwise apparent implied preemption. *Freightliner*, 514 U.S. at 287-89 (holding that the presence of an inapplicable express preemption clause does not foreclose any possibility of implied preemption). Rather, this

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[7] The true meaning of this provision relating to compliance with federal standards—as identified through its language (both specific and nonspecific), structure, and purpose—goes far in discerning Congress' intent on the issue of preemption and is examined *infra*, Part B.

Court explained that its decision in *Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive *effects*." *Id.* at 289 (citation omitted) (emphasis added).

Regardless of whether Congress included an explicit statement of its intent through an express preemption clause or a true savings clause, a federal statute may nonetheless have the *effect* of preempting conflicting state law—this is precisely what the Supremacy Clause envisions. Thus, this Court in *Freightliner* proceeded to examine the effect of the Safety Act's substantive regulations on plaintiffs' proposed common law standards even though the Court had found that express preemption was inapplicable based on the facts presented. *Id.* 289-90.

It is the Safety Act's potential for preemptive effect based upon the plain meaning of its language and the language of its duly-promulgated regulations, as the Eleventh Circuit correctly observed, that implicates the Supremacy Clause in its purest form and eliminates the judicially manufactured "presumption against preemption" in the context of conflict preemption. *Irving*, 136 F.3d at 769; *Taylor*, 875 F.2d at 826 (citing *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." (internal quotations and citation omitted))); *accord Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108 (1992).[8] A judicial "presumption against preemption" cannot overcome Congress' constitutionally-delegated authority to set aside certain laws of a State or otherwise distort the unambiguous language and strength of the Supremacy Clause. U.S. Const., Art. VI, cl. 2.

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[8] *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying a presumption against preemption in interpreting an express preemption clause).

2. *The Court of Appeals Correctly Concluded That Petitioner's Claims Would Frustrate the Objectives of the Safety Act, Disrupt the Methods Carefully Chosen By The Federal Government for Achieving Those Objectives, and Impose Liability on Respondents For Doing What FMVSS 208 Authorized Them To Do.*

With its wholly appropriate conclusion that implied conflict preemption analysis in the context of the Safety Act was alive and well in Eleventh Circuit, the court below went on to find that Petitioner's proposed common law standards presented a formidable obstacle to the purposes, objectives, and very existence of FMVSS 208. *See Irving*, 136 F.3d at 768-69. The court rightfully recognized that the effect of allowing Petitioner's claims to go forward would be tantamount to proclaiming to Congress, the Department of Transportation, and the NHTSA that it knew better than they what methods should be used to achieve the objectives of the Safety Act. *Id.* Petitioner was, the court held, asking for the imposition of a state common law standard allowing manufacturers to be financially penalized "for doing what a federal act or regulation authorized them to do." *Id.* at 769 (quoting *Kalo Brick & Tile Co.*, 450 U.S. at 318).[9] This Court has rejected requests such as this rightfully and repeatedly. The Eleventh Circuit was correct to do so as well.

The task of the court below was straightforward: (1) to determine what Congress and the NHTSA had said about a manufacturer's ability to install an automatic

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[9] Petitioner points out—and Respondents concede—that Congress' intent, as evidenced in the language, structure, and purpose, is the determinative factor in any preemption analysis. Petitioner goes much farther in her argument, however, to make the novel and wholly unsupported statement that preemption cannot occur where Congress has evinced its intent through constitutionally-permissible delegations of authority to regulating agencies. (Pet. at 12.) This is a plain misstatement of the law. *See, e.g., de la Cuesta*, 458 U.S. at 153-54 (stating that "[f]ederal regulations have no less pre-emptive effect than federal statutes" and providing that a regulation's pre-emptive force does not depend on an "express congressional authorization to displace state law").

shoulder belt and manual lap belt in 1990 model year vehicles; (2) to determine what Petitioner's purported state common law standard would say about a manufacturer's ability to install an automatic shoulder belt and manual lap belt in 1990 model year vehicles; and (3) to determine whether the two were inconsistent in that it would be impossible for a party to comply with both or because the latter would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Kalo Brick & Tile Co.*, 450 U.S. at 319.

a. ***Petitioner's Proposed Common Law Standards Would Effectively Foreclose A Federally-Approved Option.***

In model year 1990, FMVSS 208 encouraged manufacturers to provide the public with a variety of specified restraint systems, including the system Respondents chose to install in the 1990 Mazda MX-6. Petitioner is asking this Court not only to invalidate that very restraint system, but to take away from automobile manufacturers and the public the right to choose from among the options specified in FMVSS 208. It is a right that the federal government deliberately established in order to promote federal safety policies, and a right that Petitioner cannot take away. *See Taylor*, 875 F.2d at 827 (citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982) ("[A] state common law rule cannot take away the flexibility provided by a federal regulation, and cannot prohibit the exercise of a federally granted option.")).

By sanctioning a common law rule that would have required Respondents to have installed an automatic three-point belt or a manual three-point belt with an air bag in the 1990 Mazda MX-6, this Court would prevent the Safety Act in general, and FMVSS 208 in particular, from operating the way Congress intended it to operate.

First, Petitioner's proposed common law rule would foreclose manufacturers' use of a restraint system that the NHTSA specifically encouraged manufacturers to provide to consumers. Her common law rule would thus punish

Respondents and an array of other manufacturers for providing a restraint system that the federal government concluded was important to federal purposes and policies. *See Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414 (10th Cir. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *O'Bryan v. Volkswagen of America, Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992); *cf. Perry v. Mercedes-Benz of North America, Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (recognizing that claims denominated as "design defect claims" will be preempted if the proposed alternative design creates an actual conflict wtih FMVSS 208 and the methods chosen by Congress to implement FMVSS 208). Petitioner is, in effect, second-guessing the judgment of the regulatory agency charged with carrying out the purposes and policies of Congress as set forth in the Safety Act, and eliminating the automatic shoulder belt as a viable option under FMVSS 208.

Second, Petitioner's proposed common law rule would undermine the methods the NHTSA has adopted to meet its charge by removing the principle of choice from FMVSS 208's regulatory framework. Because Congress and the NHTSA have determined that flexibility and choice are important components to FMVSS 208 and the Safety Act, Petitioner must not be allowed to destroy those components. *See Taylor*, 875 F.2d at 827 (holding that a state common law rule that would remove the element of choice from FMVSS 208 frustrates the regulatory scheme and is thus impliedly preempted); *Pokorny*, 902 F.2d at 1123-24 (finding that a common law rule requiring the installation of air bags or automatic seat belts when they were not required was impliedly preempted because it conflicted with the flexibility and choice of FMVSS 208).

For these reasons, this Court must reject Petitioner's attempt to rewrite the Safety Act and FMVSS 208, and leave standing the Eleventh Circuit's decision holding her claims impliedly preempted.

b. *Petitioner's Proposed Standards Would Eviscerate the NHTSA's Ability to Meet the Congressionally-Mandated Objective of Prescribing Standards for Motor Vehicles in Interstate Commerce.*

In stating the purpose and policy of the Safety Act, Congress found it necessary "to establish motor vehicle safety standards for motor vehicles and [motor vehicle] equipment in interstate commerce . . . ." 15 U.S.C. § 1381. That is, Congress deemed the subject matter of motor vehicle safety standards important enough to warrant nationwide action that would result in implementation of a uniform, nationwide policy. Petitioner's proposed common law rule, however, would defeat Congress' efforts to prescribe rules that are compatible with interstate commerce. To allow Petitioner's claim in this case to go forward would, in effect, give litigants across the country "line-item veto" power over federal regulations. The effect of allowing plaintiff here to go forward is contrary to both law and logic.

c. *Petitioner's Proposed Standards Would Wreak Havoc, Retrospectively, on the Federal Government's Phase-In of Passive Restraint Systems.*

Even when the Department of Transportation judged that passive restraints, and later air bags, would be appropriate, it planned implementation of these standards carefully. Passive restraints were to be phased in, beginning with only 10% of cars built in 1987. *See* 49 Fed. Reg. 28962, 28999-29000. And in 1991, when Congress mandated air bags in all cars, it provided a six-year lead-in time and then a phase-in. *See* Pub. L. No. 102-240, § 2508.[10]

When the 1990 Mazda MX-6 was built, the passive restraint phase-in was just concluding, and the air bag

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[10] These lead-in times were calculated carefully, and were necessary for two reasons: (1) "for the public to become accustomed to the technology and the need for protection"; and (2) to promote a variety of different systems and to "encourage the development of [restraint] technologies." *E.g.*, 49 Fed. Reg. 28962, at 28989 and 28997.

phase-in was not to begin until six years later. Nonetheless, Petitioner seeks to impose liability on Respondents that would have the effect of requiring air bags before the air-bag phase-in period began, thereby nullifying FMVSS 208's lead-in time. Petitioner's "no air bag" claim, if allowed, would open the door to a wholesale dismantling of an implementation schedule carefully crafted by Congress to meet the goals of the Safety Act. Petitioner must not be allowed to so disrupt the methods chosen by Congress and the NHTSA to achieve the Safety Act's objectives; this Court must turn back her request to revisit the Court of Appeals' sound decision.

B. The Eleventh Circuit's Decision Gives Effect to Congress' Intent As Expressed in 15 U.S.C. §§ 1392(d) and 1397(k), and to the Rule of Construction Directing That An Act Cannot Be Held to Destroy Itself.

Although the court below based its finding of preemption on implied conflict preemption, an examination of Congress' intent with respect to the scope of what would be characterized as express preemption reveals that the Court of Appeals' decision gives full effect to that intent.[11] When ascertaining congressional intent in the context of the express preemption doctrine, courts should look primarily to the language of the statute's preemption clause and the statutory framework surrounding the clause. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Courts should also consider, however, "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect

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[11] While Respondents did not cross-petition on the Court of Appeals' finding that express preemption was inapplicable here, the meaning of the Safety Act's express preemption clause is a necessary predicate to proper analysis of Petitioner's first and third questions presented. (Pet. at i.)

business, consumers, and the law." *Id.* (internal quotations and citations omitted).[12]

Congress conveyed its clear intent that the Safety Act preempt certain state law by including in the Act an express preemption clause providing that:

> Whenever a Federal motor vehicle safety standard . . . is in effect, no State or political subdivision of a State shall have authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The preemption provision is followed immediately by two savings clauses not applicable here. See 15 U.S.C. § 1392(d).[13] Elsewhere, the Act negates compliance with the Federal Motor Vehicle Safety Standards as an affirmative defense by stating, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

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[12] *See also Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (recognizing that "more often than not, explicit pre-emption language does not directly answer the question of whether Congress intended to preempt state law"). In these instances, the Court has admonished that resort must be had to the federal statute's structure and purpose and "nonspecific statutory language" to determine whether Congress' intent to preempt was implicit. *Id.*

[13] These savings clauses provide as follows:

> Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d).

1. *The Language and Structure of the Safety Act Provide Reliable Indicia of Congress' Intent That § 1392(d) Serve As A Meaningful Preemption Clause and That the "No-Compliance-Defense" Provision of § 1397(k) Not "Save" Otherwise Preempted Claims.*

While the court below declined to construe the Safety Act as "unambiguously manifesting" an intent to expressly preempt state common law claims that proposed state standards different from applicable, on-point federal standards, an examination of Congress' intent with respect to the Safety Act confirms the propriety of the Court of Appeals' ultimate conclusion. Here, the language and structure of the Safety Act, and the Act's legislative history, show that § 1397(k) is not, and was not intended to be, a provision that relates to the issue of preemption. Rather, § 1397(k) merely negates the availability of compliance with government standards as an affirmative defense to common law actions. *Compare* 15 U.S.C. § 1392(d) (containing the Act's true savings clauses), *with* 15 U.S.C. § 1397(k) (stating that no person may be exempted from common law liability by complying with federal standards).

First, the language of the Act's true savings clauses differs radically from the affirmative-defense-oriented "compliance with" language of § 1397(k). Like so many other true savings clauses, the language of § 1392(d) employs the traditional, sweeping, and unambiguous anti-preemption language, stating "[n]othing in this section shall be construed [to preempt certain conflicting state standards]." [14] In contrast, the more diffuse language of the

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[14] An array of federal statutes uses similarly categorical and encompassing language to "save" certain state common law claims from that statute's preemptive reach. *See, e.g.*, 29 U.S.C. § 1144(b)(2)(A) (Employee Retirement Income Security Act's savings clause); 29 U.S.C. §§ 653(b)(4) and 667(a) (Occupation Safety and Health Act's savings clauses); 49 U.S.C. § 1506 (Federal Aviation Act of 1958's savings clause); 42 U.S.C. §§ 2000e-7 and 2000h-4 (Civil Rights Act of 1964's savings clauses); 46 U.S.C. § 767 (Death on the High Seas' savings clause); *cf. Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996) (describing the

"compliance with . . . does not exempt" provision belies its function as having anything to do with preemption. Rather, that language conveys its function of preventing a manufacturer from asserting compliance as a general affirmative defense to a common law claim, regardless of the lack of conterminousness between the proposed state standard and the federal standard.[15] *See* S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352 (construing the Federal Boat Safety Act's similar no-compliance-defense provision as precluding the assertion of compliance as a complete defense). That is, the language of § 1397(k) clearly is not the language commonly employed by Congress when it intends to limit the scope of preemption; it makes no reference to preemption or the limits of federal supremacy under § 1392(d). Instead, the language simply forecloses, as a matter of federal law, the availability of compliance as a complete affirmative defense to a constitutionally-permissible state common law claim.

Second, the structure of the Act supports the view that Congress did not intend for § 1397(k) to be applied as a sweeping savings clause. In addition to the fact that the language of § 1392(d) has nothing to do with § 1397(k), and vice versa, the two provisions appear five full sections apart from each other. Moreover, a comparison of the language used by Congress in the two structurally-independent sections makes two obvious points: (a) Congress knew precisely how to limit the scope of the Act's express preemption clause by virtue of the two true, explicit savings clauses contained in § 1392(d); and (b) Congress chose not to use that explicit savings language in § 1397(k). Thus, had Congress intended the substance

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McCarran-Ferguson Act's "anti-preemption" rule as explicitly stating that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any [state] law.").

[15] The parallel language now found at 49 U.S.C. § 30103(c) (stating that the Safety Act cannot exempt a person from liability under antitrust laws) supports this interpretation.

of § 1397(k) to represent a third—and the most sweeping—exception to the preemption provision in the first sentence of § 1392(d), Congress most certainly would have included the language of § 1397(k) in its logical location—adjacent to the other two explicit savings clauses in the section entitled "Supremacy of federal standards." [16]

Third and finally, the legislative history of § 1397(k) further demonstrates that § 1397(k) is not, and was not intended to be, a provision that had anything whatsoever to do with the Act's preemptive reach.[17] Both the House and Conference reports contain sections entitled "Preemption." *See* H.R. Rep. No. 89-1919, at 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-33; H.R. Rep. No. 89-1776, at 17 (1966). Neither of these sections, however, even mentions § 1397(k); they discuss only § 1392(d), the Safety Act's only provision addressing the scope of preemption under the Act. The House report finally discusses § 1397(k) seven pages later under the heading "Prohibited Acts and Exemptions," and the conference report does not even address it.

Senator Magnuson's description of § 1397(k) lends additional support to the fact that Congress did not consider § 1397(k) to be related to preemption:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle

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[16] The true preemption provision, § 1392(d), is unmistakably entitled "Supremacy of federal standards; allowable higher standards for vehicles used by federal or state governments," whereas the title of § 1397(k) simply reads "Continuation of common law liability," without making any reference to the Supremacy Clause or preemption. *See I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) (using title of statute or section to aid in resolving ambiguity in statute's text).

[17] Because § 1397(k) was added to the Senate bill after the House and Senate conference, the Senate report contains no discussion of the provision.

> developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules of evidence are intended to be altered by this provision.

112 Cong. Rec. 21,487 (1966). The principle to which Senator Magnuson referred stated that federal safety standards "*need not* be interpreted as restricting state common law standards of care" and that "[c]ompliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added). In other words, the addition of § 1397(k) was intended merely to clarify that the Safety Act did not create an affirmative defense of compliance with government standards or, at most, that the Act's preemption provision did not occupy the field, and thus did not "*necessarily*" protect a common law defendant.[18]

This interpretation of the interplay between the preemption provision and the no-compliance-defense provision is borne out by two federal Courts of Appeals' express preemption analysis in the context of the Safety Act post-*Medtronic*. *See Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997); *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997). As the Ninth Circuit wrote in *Harris*:

> True, § 1397(k) states that compliance with Federal standards 'does not exempt any person from any liability under common law.' To be 'exempted' from liability, however, one must first be subject to it. And § 1392(d) removes the States' authority to subject anyone to liability for the breach of non-identical

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[18] If § 1397(k) *always* precluded preemption of *any* common law claim, Congress' qualification of "need not" and "not necessarily" would be not only superfluous, but internally inconsistent as well. On the other hand, if the provision merely negates compliance as a defense at trial, or precludes only field preemption, then the quoted legislative history is eminently sensible.

> safety standards. The most reasonable and plausible reading of § 1397(k), therefore, is that compliance with Federal standards does not exempt anyone from any liability that the States have authority to impose.

Harris, 110 F.3d at 1415; *cf.* S. Rep. No. 92-248, *reprinted in* 1971 U.S.C.C.A.N. at 1352 (interpreting Federal Boat Safety Act's no-compliance-defense provision similar to the Safety Act's and acknowledging that the provision is designed to "assure that . . . mere compliance by a manufacturer with minimum standards under the Act will not be complete defense to liability)). The Ninth Circuit made the painfully obvious, albeit long-overlooked, point that the possibility of being "exempted" from liability presupposes that the state has the authority to impose such liability. *Id.*[19] The Ninth Circuit is perfectly correct—under the Supremacy Clause, state enactments, including common law standards, that conflict wih an applicable, on-point federal safety standard are "void" and "without effect." *Id.* Congress' powers are not so great that it could have designed the Safety Act's no-compliance-defense provision to override the Constitution.

2. *Congress' Intent In Providing For Preemption Under the Safety Act Is Wholly Consistent With The Rule That An Act Should Not Be Held To Destroy Itself.*

The Court of Appeals' decision below, while reaching the correct result, simply did not articulate properly Congress' intent as evidenced by the plain language of the Safety Act, and the structure and purpose of the Act. It chose instead to ascribe meaning to both the preemption and the no-compliance-defense provisions by concluding that the combination of the two prevented a finding of a sufficiently clear congressional intent to expressly preempt common law claims.[20] The result reached

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[19] *See also Webster's Ninth New Collegiate Dictionary* 434 (1986) (defining "exempt" as "free or released from some liability or requirement to which others are subject").

[20] The Court of Appeals did not say as much, but lurking beneath its conclusion that § 1392(d) and § 1397(k) provided conflicting

by the Court of Appeals and the more sound reading of the two provisions are bolstered, however, by a familiar and long-standing rule of statutory construction—namely, that an act cannot be held to destroy itself. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907); *accord American Tel. and Tel. Co. v. Central Office Tel., Inc.*, —— U.S. ——, 118 S. Ct. 1956, 1964-65 (1998).

As Petitioner would have it, the Eleventh Circuit should have ignored both the preemptive intent of Congress and the preemptive effect of the statute, as well as the rule that a statute should not be interpreted to strip itself of its substance and intended efficacy. (Pet. at 16.) This Court's teachings, however, demand that Congress' intent be honored—that the express preemption provision in § 1392(d) and the provision in § 1397(k) precluding, as a matter of federal law, compliance with government standards as an affirmative defense mean what they say. *Compare Cipollone*, 505 U.S. at 521 (holding that a term such as "requirement" "sweeps broadly and suggests no distinction between positive enactments and common law" but rather "easily encompass obligations that take the form of common law rules") (plurality opinion), *with Central Office Tel., Inc.*, 118 S. Ct. at 1965 (ruling that a savings clause "cannot in reason be construed as continuing in [litigants] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act") (quoting *Abilene Cotton*, 204 U.S. at 446 (internal quotations omitted)).

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evidence of Congress' intent is the untenable distinction between positive enactments and common law. This Court has disabused federal courts of the notion, however, that terms such as "standard," "requirement," and "prohibition" do not bespeak standards and requirements established by the common law. *See Medtronic*, 518 U.S. at 503-05 (Breyer, J. concurring in part and concurring in the judgment); *Cipollone*, 505 U.S. at 521 (plurality opinion), and 548-49 (Scalia, J., and Thomas, J., concurring in the judgment in part and dissenting in part).

C. The Question of Whether FMVSS 208 Preempts Claims Such As Petitioner's Will Become Increasingly Rare and Unimportant By Virtue of FMVSS 208's Currently-Effective Mandatory Air Bag Rule and Thus Does Not Merit Review By This Court.

Respondents acknowledge that a handful of decisions from the highest courts of certain states have taken a position that is inconsistent with the Court of Appeals' decision below, while still other state appellate and supreme courts have followed the federal appellate courts' proper path. (*See* Pet. at 8-9 (citations omitted).) This handful of dissenting state supreme courts does not justify this Court's review of the decision below, however, for one powerful reason. That reason is the ephemeral nature of the factual context in which preemption presented itself in this case. Any decision by the Court here would lack the staying power and gravity that should accompany the Court's pronouncements.

This case and the seven others like it—where this Court has denied a petition for a writ of certiorari—involve the preemptive effect of various occupant restraint system options under FMVSS 208. Typically, as is the situation here, the petitioner alleges that rather than choosing the federally-approved option that it did, the manufacturer should have chosen to install an air bag.[21] *See Montag v. Honda Motor Co., Ltd.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, —— U.S. ——, 117 S. Ct. 61 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989); *cert. denied*, 494

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[21] Petitioner did not addrses her second question presented—whether her failure to warn claim was preempted—in her brief. As the Eleventh Circuit observed, the answer to this question was purely a function of Georgia law and the peculiar evidence adduced by Petitioner in the trial court. *Irving*, 136 F.3d at 769-70. These facts show beyond doubt that Petitioner's second question presented does not approach certworthiness.

U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *cf. Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996), *cert. denied*, —— U.S. ——, 117 S. Ct. 1245 (1997) ("no lap belt" claim); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072, *pet. for reh'g denied*, 516 U.S. 1154 (1996) (letting stand a state court decision finding no preemption of a "no air bag" claim).

The ever-evolving character of FMVSS 208 demonstrates, however, that claims presented by the cases above will slowly but surely fall by the wayside as vehicles manufactured before air bags were mandatory cease to be driven. *See* Pub. L. No. 102-240, § 2508 (requiring air bags in 100% of passenger vehicles manufactured in model year 1998). Thus, any pronouncement by the Court on the issues presented here will likewise fade in its usefulness. Petitioner has presented no reason why this Court should depart from its seven previous decisions to deny similar petitions. This Court should not change course and exercise its discretionary powers to render a decision that will face inevitable obsolescence.

CONCLUSION

Based upon the foregoing, review by this Court is neither necessary nor appropriate. Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

LANNY B. BRIDGERS *
ANDREW T. BAYMAN
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4600
Attorneys for Respondents

Dated: October 30, 1998

* *Counsel of Record*